No. 76-999

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In the Supreme Court of the United States

OCTOBER TERM, 1976

JANE COE, ET AL., PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion and order of the district court (Pet. App. A) are reported at 426 F. Supp. 774.

JURISDICTION

The judgment of the district court was entered on November 23, 1976. Petitioners filed a notice of appeal to the court of appeals on December 13, 1976, and an amended notice on December 15, 1976. The record was docketed in that court on December 16, 1976. The petition for a writ of certiorari before judgment was filed on January 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Sections 454(4) and 402(a)(26) of the Social Security Act, 42 U.S.C. (Supp. V) 654(4) and 602(a)(26), provide, effective August 1, 1975, (1) that states participating in the Child Support and Establishment of Paternity program must attempt to establish the paternity of children born out of wedlock and to secure child support payments from any person legally liable for such support, and (2) that aid recipients under the Aid to Families with Dependent Children program must cooperate with such state efforts as a condition of eligibility. Those provisions are subject to a "good cause" exception if it is determined, in accordance with regulations to be promulgated by the Secretary and submitted to and approved by the Congress, that compliance would not be in the best interests of the child.

The question presented is whether Congress intended for the mandatory recipient cooperation and state enforcement aspects of the foregoing provisions to take effect on August 1, 1975, as provided, even though the Secretary's good cause regulations would not by then be promulgated and approved.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set forth at Pet. App. B.

STATEMENT

1. This case involves the construction of federal legislation designed to strengthen state efforts to establish the paternity of children born out of wedlock and to secure child support payments from persons legally responsible for such support. In 1975, Congress passed Pub. L. 93-647, 88 Stat. 2337. That statute added to Title IV of the Social Security Act a new Part D, the Child Support and Establishment of

Paternity program, providing for federal financial and technical assistance to approved state child support programs (Sections 451-460, 42 U.S.C. (Supp. V) 651-660), and amended Part A of Title IV—the program of Aid to Families with Dependent Children—to provide that state plans under that program must require, as a condition of eligibility, that aid applicants or recipients assign to the state any rights to support from any other person and cooperate with state efforts to establish paternity and to secure support payments. 42 U.S.C. (Supp. V) 602(a)(26).

A state wishing to participate in the Child Support program must submit to the Secretary of the Department of Health, Education, and Welfare a plan providing, *inter alia*, for the establishment of a state agency that will undertake to establish the paternity of and to secure support payments for any child with respect to whom an assignment of rights under Part A has been made. That agency (the "IV-D agency") must be different from the agency administering the AFDC program (the "IV-A agency"). 42 U.S.C. (Supp. V) 654(4).[1]

2. Pub. L. 93-647 initially was scheduled to take effect on July 1, 1975 (Pub. L. 93-647, Section 101(f), 88 Stat. 2361). On June 30, 1975, however, Congress postponed the effective date to August 1, 1975 (Pub. L. 94-46, Section 2, 89 Stat. 245), and then passed Pub. L. 94-88, 89 Stat. 433, amending Pub. L. 93-647 in several respects. The obligation of the AFDC applicant or recipient to cooperate with state efforts to establish paternity and secure support payments was made subject to exception upon a finding of

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[1] Participation by the states in the AFDC program is optional, but any state participating in that program must participate in the Child Support program as well. Section 402(a)(27), 42 U.S.C. (Supp. V) 602(a)(27).

"good cause for refusing to cooperate as determined by the State [IV-A] agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child * * *." Pub. L. 94-88, Section 208(a), 89 Stat. 436 (42 U.S.C. (Supp. V) 602 (a) (26)(B)). Similarly, the obligation of the IV-D agency to attempt to determine paternity and to secure child support payments was made subject to exception if the IV-A agency has determined in accordance with the Secretary's standards that compliance would not be in the best interest of the child. Pub. L. 94-88, Section 208(b) and (c) (42 U.S.C. (Supp. V) 654(4)(A) and (B)). The amendments further provided that the good cause standards prescribed by the Secretary must be submitted to the Congress, to take effect sixty days thereafter unless disapproved by either House. Pub. L. 94-88, Section 208(d)(1), 89 Stat. 436. Finally, Congress provided that the amendments would become effective on August 1, 1975, "unless otherwise specified therein." Pub. L. 94-88, Section 210, 89 Stat. 437.[2]

3. The Secretary's regulations implementing the mandatory recipient cooperation and state enforcement requirements of the new legislation became effective on August 1, 1975 (40 Fed. Reg. 27154-27169; see also 40 Fed. Reg. 31766-31767). The regulations implementing the recipient cooperation requirement under Part IV-A provide for no exceptions to that requirement. 45 C.F.R. Part 232. The regulations implementing the new Child Support program provide for no exceptions to the IV-D agency's obligation to seek support payments, and provide for only a narrow exception to that agency's obligation to attempt to

[2]Pub. L. 94-88 was signed into law on August 9, 1975.

establish the paternity of children born out of wedlock. 45 C.F.R. Parts 301-304.[3]

The Secretary has published proposed "good cause" regulations (41 Fed. Reg. 34298), but those regulations have not yet been submitted to Congress and therefore are not yet in effect. HEW has been enforcing the mandatory requirements since their effective date of August 1, 1975, and has taken the position that, although the states are not authorized to amend their Part IV-A plans to include formal standards for implementing the "good cause" exception, until the Secretary's regulations are in effect the states should "utilize care and common sense in administering its program so that children and their custodial parents or caretaker relatives will not be harmed by the support enforcement process."[4] In addition, the Secretary has taken the position that federal funds will not be withheld from

[3]45 C.F.R. 303.5(b) provides:

> The IV-D agency need not attempt to establish paternity in any case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending, if, in the opinion of the IV-D agency, it would not be in the best interests of the child to establish paternity.

[4]Memorandum of November 21, 1975, from HEW Acting Director, Office of Child Support Enforcement, to Elmer W. Smith, Acting Regional Director, Office of Child Support Enforcement (printed at Appendix F of the Jurisdictional Statement in *Maher* v. *Doe*, No. 76-878); see also letter of July 30, 1976, from Charles C. Gentile, Acting Regional Director, Office of Child Support Enforcement, Region I, to Vincent Capuano, Chief of Eligibility Services, Connecticut Department of Social Services (also printed at Appendix F in *Maher*).

Although the foregoing documents refer expressly only to the IV-D agency's enforcement responsibility, we are informed by the Secretary that HEW also takes the position that the IV-A agency should not declare an unwed mother ineligible for assistance for a failure to cooperate with the state enforcement efforts unless that agency has first made a determination that "good cause" for the failure does not exist.

states that incur welfare payment obligations as a result of "a good faith effort to ascertain on a case by case basis whether cooperation in establishing paternity would not be in the child's best interests."[5]

4. Petitioners, the National Welfare Rights Organization, the State of Alaska, and five mothers receiving AFDC benefits on behalf of their dependent children, brought this action in the United States District Court for the District of Columbia seeking a writ of mandamus to compel the Secretary to promulgate "good cause" regulations and an injunction restraining him in the meantime from enforcing his regulations implementing the mandatory recipient cooperation and state enforcement provisions of 42 U.S.C. (Supp. V) 602(a)(26) and 654(4). On cross-motions for summary judgment, the district court ruled that mandamus was inappropriate because the Secretary already has issued proposed "good cause" regulations (Pet. App. 5a and note 4) and denied injunctive relief on the grounds that the statutory scheme and its legislative history indicate that Congress had been aware that the "good cause" regulations would not take effect until some time after August 1, 1975, but had nonetheless intended for the mandatory provisions of the legislation to become effective on that date (*id.* at 9a-11a). The court accordingly granted summary judgment in favor of the Secretary (*id.* at 11a).

Petitioners filed a notice of appeal in the court of appeals on December 13, 1976, and now seek a writ of certiorari before judgment in that court.

ARGUMENT

1. Rule 20 of the Rules of this Court provides that a writ of certiorari before judgment in the court of appeals "will be granted only upon a showing that the case is of such

[5]Letter of July 30, 1975, *supra*, note 4.

imperative public importance as to justify deviation from normal appellate processes and to require immediate settlement in this court." This case does not meet that standard. The issue of statutory construction raised by petitioners affects only a relatively small number of individuals and in any event will become moot upon promulgation by the Secretary and approval by Congress of "good cause" regulations.[6] It does not compare in importance with the issues at stake in the handful of past cases in which the Court has granted a writ of certiorari before judgment in the court of appeals. *E.g., United States* v. *Nixon*, 418 U.S. 683; *Bolling* v. *Sharpe*, 347 U.S. 497; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579. "[D]eviation from normal appellate processes" and "immediate settlement in this court" therefore are not warranted.

2. Nor does the presence on the Court's appellate docket of *Maher* v. *Doe*, No. 76-878, involving related issues, warrant certiorari at the present stage of this case. As we have explained in our brief *amicus curiae* in *Maher*,[7] the decision in that case is ambiguous as to whether the states currently are entitled to make their own *ad hoc* "good cause" determinations in connection with the enforcement of the mandatory provisions of the new federal legislation, or whether they must forego enforcement altogether until the Secretary's regulations are in effect.[8] Moreover, since the date of decision in

[6]We are advised by the Secretary that he anticipates submitting "good cause" regulations to Congress within as soon as two months, but in any event no later than the end of the calendar year.

[7]We are sending petitioners' counsel a copy of that brief.

[8]It therefore is impossible to determine whether, as petitioners contend (Pet. 13-14), the result in *Maher* conflicts with the decision in this case.

Maher—which concerns, *inter alia*, the State of Connecticut's ability to enforce, in light of the federal enactments, a state statute subjecting unwed welfare mothers to contempt sanctions for refusing to name the putative father of their illegitimate children—Connecticut has passed a new law that would appear to bear directly on the issues involved in that case. For that reason, and because the decision in *Maher* is ambiguous, we have suggested that the Court should vacate the judgment of the three-judge district court in that case and remand for reconsideration and clarification. In addition, even if probable jurisdiction were noted in *Maher*, it is not certain that the Court would reach the merits of that case inasmuch as the district court's judgment interferes with pending state contempt proceedings, in apparent contradiction of the principles enunciated in *Judice* v. *Vail*, No. 75-1397, decided March 22, 1977. In these circumstances certiorari should not be granted in the present case simply because of the pendency of the appeal in *Maher*.[9]

3. The district court correctly refused to enjoin the Secretary from requiring the states to enforce the mandatory provisions of the new federal enactments until the Secretary's "good cause" regulations are in effect.[10] Con-

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[9]Moreover, even if the Court noted probable jurisdiction in *Maher* and rendered a decision on the merits before the Secretary's "good cause" regulations are in effect, petitioners would be entitled, in the court of appeals, to claim the benefit of any aspects of such a decision favorable to them. In short, whatever the disposition in *Maher*, there is no compelling reason for the Court to consider the present case at this time.

[10]Pub. L. 94-88, 89 Stat. 433, amended Pub. L. 93-647, 88 Stat. 2337, not only by adding the "good cause" exception to the requirements established by the earlier Act but also in several other respects. Section 210 of Pub. L. 94-88, 89 Stat. 437, provided that all of the amendments were to take effect on August 1, 1975, "unless otherwise specified

gress provided that all aspects of the new legislation were to become effective on August 1, 1975, and the states accordingly were obliged from that date on to enforce both the mandatory cooperation and enforcement requirements and the "good cause" exception to those requirements. Even though the Secretary's "good cause" regulations could not possibly have been promulgated and approved by August 1, 1975, it does not follow that, in the interim, the states should either forego enforcement of the mandatory requirements or enforce those requirements without regard to the best interests of the children involved in individual cases. As we noted in our brief in *Maher* (p. 6 and n. 8), the first alternative would defeat Congress' intent that illegitimate children enjoy the benefit of the mandatory paternity and support provisions of the legislation as of August 1, 1975, and the second would frustrate Congress' desire to assure that enforcement would not be undertaken in the small number of cases where the child's best interests are to the contrary.[11]

Accordingly, the Secretary has taken the position that, until his "good cause" regulations are effective, the states should enforce the mandatory provisions of the legislation

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therein." The district court ruled (Pet. App. 10a-11a) that the requirement that the Secretary submit his "good cause" regulations to Congress for its approval indicated that Congress intended to include the effective date of the "good cause" exception among those "otherwise specified." We agree with petitioners (Pet. 32), however, that the "unless otherwise specified" language probably was meant to refer to a separate provision of Pub. L. 94-88, expressly affording the states seven months in which to implement the requirement in 42 U.S.C. (Supp. V) 602(a)(26)(A) that aid recipients assign support rights to the states (see pages 2-3, *supra*).

[11]Congress believed that the establishment of paternity and securing of support would be in the best interests of the child in most cases. See S. Rep. No. 93-1356, 93d Cong., 2d Sess., pp. 42-44, 48-52 (1974).

in accordance with their own "good cause" determinations made on a case-by-case basis (see pages 5-6, *supra*). Contrary to petitioners' suggestion (Pet. 17, 26), the Secretary has not insisted that the states enforce the mandatory requirements without regard to "good cause" exceptions. Rather, he has determined that, since 42 U.S.C. (Supp. V) 602(a)(26) provides that the Secretary shall promulgate "good cause" regulations, the states are not authorized to amend their Part IV-A plans to reflect the adoption of across-the-board "good cause" standards until the federal regulations are in effect. In the meantime, however, the states are free to make their own "good cause" determinations, without fear that federal funding will be withheld, provided that those determinations are reasonable and are made in good faith. See pages 5-6, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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